NO. 2695.

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN MAC AULAY,
Plaintiff in Error,

vs.

ALASKA GASTINEAU MINING COMPANY
A Corporation,
Defendant in Error.

Petition for Rehearing

J. H. COBB,
Attorney for Plaintiff
in Error.

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PETITION FOR REHEARING

We have carefully considered the opinion of the Court in this case, and belief therefrom, that the Court has overlooked certain vital and controlling elements in the case. This is not surprising because the plaintiff in error, from his poverty was unable to have the record printed, and this led to a certain want of clearness in the brief. We therefore most respectfully ask the Court for a rehearing.

The points to which reference is made and which are not alluded to at all in the opinion filed are the following:

1st. The plaintiff testified, that when he was first employed, he was put to work at another and different place in the mine; that in about an hour before the accident he was sent by the foreman, and put to work in the upraise, and knew nothing of the conditions existing, or the dangers to which he was subjected. This evidence was not contradicted. *Plaintiff therefore did not assume any of the risks of the accident by which he was injured.*

2nd. The evidence further shows without conflict, that in prosecuting the work of driving the upraise, the ladders for the use of the machine

men in going up to the face of the upraise after the blast, were kept in the intermediate drift, so that the upper part of the upraise could be barred down before there was any work done in removing the muck and thereby exposing the workman to the danger of rock falling from the unbarred drift. On this particular occasion no ladders were in the intermediate drift as they should have been. For this reason the drill men could not complete the barring down of the loose rock in the upper end of the upraise, until the muck on the bulkhead was removed and the bulkhead opened, and a further supply of ladders hoisted. It was while doing this work, which was made necessary by the negligence of the defendants or some of its agents, that the plaintiff was injured. And it is immaterial whether the negligence was the negligence of the Company or one of its servants, for the fellow-servant rule is abolished in Alaska by Chapter 45, Session laws of 1913, quoted in the brief.

We have then a case of an unusual and dangerous situation caused by the negligence either of the defendant, or those for whose negligence it was responsible; and an employee summoned from another place, and sent to where he was exposed to these dangers, without any previous knowledge of their existence, or of the conditions out of which they grew.

It may well be that even where dangerous conditions are caused by the negligence of the

master and a servant is directed to and does go to work, exposed to those conditions, and knows of the dangers, he cannot recover for an accident, for he assumes the risk. But where the danger is caused by negligence, and the servant is set to work exposed thereto, and ignorant thereof, it cannot be said that he assumes the risk. Assumption of risk rests upon the voluntary choice of the servant.

While it is true that a number of witnesses testified generally that the method of driving the upraise was in a proper miner-like way, and that the dropping of rocks is one of the incidents at times unavoidable, yet there was no evidence offered to meet the claim of plaintiff that if the ladders had been in the drift where they were usually kept, there would have been no necessity for putting him to work as was done, beneath an upraise the upper end of which had not been barred down, so as to minimize the danger from falling rock. And under the evidence it was for the jury to say whether this negligence was the proximate cause of the injury.

The case in the trial Court turned upon the question whether the evidence was sufficient to go to the jury as to where the rock came from—whether from that portion of the upraise that was barred down or that part not barred down. It was conceded that the case should go to the jury if the rock came from the portion not barred; and

the plaintiff in error briefed the case on that point. This Court has affirmed the case on the theory that plaintiff assumed the risk: Yet the accident by which he was injured was almost certainly due to the failure of the machine men to bar down the upper end of the upraise. This failure was due to failure to have the ladders in the intermediate drift. This necessitated exposing the plaintiff to the danger from falling rock from the unbarred upraises. Pursuant to orders he exposed himself to these extraordinary dangers without any knowledge of their existence.

We think that a careful reconsideration of the case will convince the Court that the case should have gone to the jury. We know that same accidents necessarily happen in all mining communities, for which no one is legally or moraly liable. But where, as in this case, a dangerous condition of a mine is brought about by negligence and a servant, in ignorance of that condition, is exposed to the danger, and injured thereby, then the master should be held liable.

The evidence would have justified the jury in finding

1st. That the accident by which plaintiff was injured was caused by the failure to bar down the upper part of the upraise before plaintiff was put to work removing the muck; and

2nd. That this failure was due to the negligence in failing to have the requisite number of

ladders on hand in the intermediate drift. If this was true the plaintiff was entitled to recover.

J. H. COBB,
Attorney for Plaintiff
in Error.

I hereby certify that in my judgment the above and foregoing petition for a rehearing is well founded and is not interposed for delay.

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Attorney for Plaintiff in Error.